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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1088

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RESPONDENT respectfully prays that petitioner's petition for a Writ of Certiorari to the Supreme Court of the State of Oregon be denied.

JURISDICTION

Respondent denies that this Court has jurisdiction under 28 U.S.C. § 1257 (3), and contends it should not review the State court judgments below because, in summary: (1) No substantial federal question is involved; (2) no constitutional issues of due process, or otherwise, were timely raised, preserved or presented in the State courts, and (3) the decision below could have and did rest on substantial and sufficient state grounds. These points are more fully discussed below.

QUESTIONS PRESENTED

Respondent believes the statement of "Questions Presented" in the Petition (pp. 2, 3) is argumentative, misleading and inaccurate. From the petition itself, from the portions of the record certified in this proceeding, and from the authorities; it will be apparent that no valid, substantial issue of due process, or any other federal question, exists. Specific, factual flaws in each of Petitioners' four "Questions Presented" include the following:

1. Respondent, the State of Oregon by and through its State Highway Commission, knew nothing of the supposed "relationship." There was no concurrent or continuing "relationship", but only a one-time, arm's length transaction whereby the Trial Judge and his partners purchased land from the State Board of Control, a separate and distinct agency of the State of Oregon. The sale was by sealed bid pursuant to a widely advertised offer to sell. The transaction was concluded and a matter of public record months before this case was assigned to the judge for trial. Petitioners admit that the transaction itself was fair and regular (Pet. p. 7, n. 3);

Petitioners' attempt to disqualify the Trial Judge came more than four years after the trial, nearly eight months after the Court of Appeals of the State of Oregon affirmed the judgment, and after the initial denial of review by the Supreme Court of the State of Oregon.

2. There was no "specific ruling discrediting all of the evidence of Petitioners." In his written opinion, the Trial Judge noted the failure of defendants to call potential witnesses including Colonel DeLong, who was the principal officer of Petitioner DeLong

Corporation and project manager during most of the events in question. The Court noted that failure was:

> ". . . in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with caution."

The Court's comment was specifically assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

3. The trial judge did not enter "a declaratory Judgment finding Petitioners liable for any damage due to delay incurred by a third party . . ." There was no attempt to adjudicate that anyone was liable to a third party. The Declaratory Judgment entered May 23, 1969 provided:

> "6. As between plaintiff and defendants, any and all delay to United States Steel Corporation, the contractor for the steel superstructure erected upon the substructures which were the subject of the contract between plaintiff and defendant DeLong Corporation, which occurred from and after April 13, 1964, was caused by the fault of defendant DeLong Corporation;"

Such declaration was specificially assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

4. Respondent categorically denies that any of its exhibits were "fraudulently offered and substantially altered." It has not been and cannot be demonstrated that the trial court materially relied on the challenged exhibits. The authorship and identity of the same exhibits were questioned at the trial. Their admission in evidence was specifically assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

STATEMENT OF CASE

Respondent disagrees with much of petitioners' statement of the case. It is argumentative and in many respects inaccurate and misleading.

By way of background, this case arose from a contract executed on June 29, 1962 between petitioner DeLong Corporation and respondent. Petitioner, The Travelers Indemnity Company furnished the construction bond covering the contract. Under the contract, DeLong was obligated to construct a major portion of the substructure of a bridge across the estuary of the Columbia River at Astoria, Oregon.

In April, 1964, because of failures of DeLong to perform, respondent terminated the contract and subsequently relet the contract to Raymond International, who completed the work.

Petitioners brought an action on the contract against respondent in the U.S. District Court for Oregon. That action was dismissed because of lack of federal jurisdiction in August, 1964. *DeLong Corporation v. Oregon State Highway Commission*, 233 F. Supp. 7, affirmed 343 F.2d 911, cert. denied 382 U.S. 877.

Respondent, on August 30, 1965, by and through its Highway Commission, filed its complaint against petitioners in the Circuit Court of the State of Oregon for the County of Marion.

There was extensive preliminary legal maneuvering with resultant delays. During this period the Astoria Bridge was completed and opened to traffic.

Beginning in November, 1967, there was approximately four and one-half months of intensive discovery and depositions. Petitioners examined voluminous records, diaries, correspondence, maps, plans and other documents from respondent's files. Petitioners deposed in minute detail numerous engineers and employes of respondent. Some individual depositions took two or three days or more.

Just before trial the case was assigned to the Honorable George A. Jones, Circuit Judge. The trial commenced on March 18, 1968 and ran through September 1968. There were over 900 exhibits and over 9,000 pages of testimony.

On January 31, 1969, the trial court, by memorandum opinion, entered its findings in favor of respondent. That opinion is set out in the petition herein (Pet. pp 3a-7a). Judgment was entered on May 23, 1969.

Petitioners appealed from the judgment. The case moved through the Oregon Court of Appeals and the Oregon Supreme Court at a "snails pace". Petitioners obtained extensions of time at virtually every procedural step. On December 12, 1972, the Oregon Supreme Court entered its final order in this case refusing to grant defendants' (Petitioners here) "Supplemental Petition for Reconsideration of Petition for Review."

Thereafter, petitioners commenced this proceeding. They also filed in the U.S. District Court for Oregon a separate equitable proceeding to permanently enjoin the enforcement of respondent's state Court Judgment, and

also asked for a temporary injunction to restrain enforcement of said judgment pending litigation. Petitioners have appealed to the Ninth Circuit from the trial Court's order denying the temporary injunctions.

In their statement of the case petitioners inaccurately portray the circumstances of the land transaction between the Oregon Board of Control and the Trial Judge and his partners.

The Oregon Board of Control is made up of the Governor, the Secretary of State and the State Treasurer, the three principle elected officers in Oregon. Among its duties, the Board administered the State's penal and mental institutions, as well as the deaf and blind schools and the State T.B. Hospital.[1] The Board, on the advice of its staff and its "Land Use Committee" decided to sell the Colony Farm which had become surplus to the needs in the State. See Affidavit of Carl A. Haugerud (Infra pp. 3-A–5-A).

An appraisal was obtained from the Oregon Department of Veterans' Affairs. The staff appraisal dated July 28, 1965, reported the value of the Colony Farm at $175,000. See Affidavit of appraiser Don J. Mason, (Infra pp. 6-A–7-A).

Between August 17, 1965 and February 16, 1966, after advertising in newspapers in Los Angeles and San Fran-

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[1]The functions of the Board of Control are entirely different and separate from those of the Highway Commission. *DeLong Corporation v. Oregon State Highway Commission, supra*, 233 F. Supp. 7 (D.C. Or. 1964) contains a good discussion of the history, composition and functions of the Highway Commission. *Potter v. McCall*, 433 F.2d 1087 (9th Cir. 1970) discusses to a lesser degree the functions of the Board of Control. Also see Affidavit of Carl A. Haugerud (Infra pp 3-A–5-A).

cisco, California, Portland, Salem and Dallas, Oregon and in farm papers in five Northwestern States; the Board of Control on three occasions attempted to sell the Colony Farm. The minimum price on all occasions was $175,000, but the terms of payment were liberalized on the subsequent attempts and sealed bids were again solicited.

No bids were received on the first two occasions, and only one bid by Green Villa Farms on the third occasion. On February 16, 1966, the Colony Farm was sold on Land Sale contract to that company for $175,000. In July, 1967, the State was paid off in full on its contract. (Pet p. 21a) Also see Affidavit of Carl A. Haugerud, (Infra pp. 3-A–5-A).

Contrary to statements in petitioners' brief, Judge Jones had nothing whatsoever to do with this case until it was assigned to him for trial during the first or second week in March, 1968.

Presiding Judge Val D. Sloper presided over all preliminary legal matters prior to trial that commenced on March 18, 1968. Because the attorneys estimated that the trial would last four to six weeks or longer, Judge Sloper could not personally be involved in the trial of the case. He assigned it to Judge Jones for trial. See Affidavit of Honorable Val D. Sloper (Infra pp. 1-A–2-A).[2]

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[2] The affidavits of Judge Sloper, Don J. Mason and Carl A. Haugerud are reproduced in the Appendix from the record in the related case, *DeLong v. Hon. Lee Johnson*, Civil Case Number 73-20, U.S. District Court for Oregon.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I. No Substantial Federal Question is Involved.

It is believed apparent that "Questions Presented" Nos. 2, 3 and 4, as stated by petitioners (Pet., pp. 2, 3) do not involve any constitutional issues. These deal, respectively, with (2) the right of a state judge, sitting as the trier of fact, to weigh the evidence in accordance with recognized rules; (3) the scope of declaratory relief between the immediate parties to a declaratory action tried in State courts under State law, and (4) the application of ordinary rules of evidence in a State court civil action. All three are basically local matters for the state courts and the state legislatures.

Each of these asserted errors was fully submitted to the State appellate courts, duly considered, and rejected. No constitutional grounds were urged there. Documentation of these statements as to each of petitioners four questions will be hereinafter set out.

Petitioners' Question No. 1, relating to the trial judge's non-disclosure of a supposed "relationship" with Respondent, has been *artfully but unconvincingly contrived* to suggest that this Court should perceive and rule upon an issue of constitutional magniture, relating to the right to a trial before an impartial tribunal. No authorities have been cited which suggest that the actual facts of this case give rise to a constitutional issue. The merits of the claim hereinafter discussed discloses that no substantial issue, either state *or* federal exists.

Petitioners objection to the supposed "relationship" was first raised in Petitioners' "Supplemental Petition for Reconsideration of Petition for Review, filed in the Oregon Supreme Court on December 1, 1972. To the extent that specific grounds were there assigned, it appears possibly that Petitioners' intended to rely upon both state and federal grounds.[6]

This Court has recognized that a constitutional issue first raised in a petition for rehearing in a state appellate court comes too late, and such issue will not be reviewed here. *Hanson v. Denckla*, 357 U.S. 234, 243, 244, reh. den. 358 U.S. 858 (1958); *Radio Station WOW vs. Johnson*, 326 U.S. 120, 128 (1945).

Here, the so-called constitutional issue relating to the Judge did not surface until after the State Court of Appeals affirmed the trial court judgment and denied a rehearing, the State Supreme Court denied a petition for review, and the petitioners filed a petition for reconsideration. Only then, in a last-ditch "Supplemental Petition for Reconsideration of Petition for Review" did petitioners suggest that the undisclosed "relationship"

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[6] For example, they urged: "It [the trial courts failure to disclose] thus vitiated the entire trial proceedings *and* such failure effectively deprived petitioners of the exercise of their sacred and constitutional right to be assured of a fair and impartial judge." (Supp. Pet., p 7, emphasis added.) "The law in this State and the interpretation of the constitutional right to a fair and impartial trial and due process of law by this Court and the Supreme Court of the United States would have required Judge Jones to grant Counsel's Motion [to disqualify the Judge]." (Supp. Pet., P. 8.) After citing the Code of Justinian and various Oregon decisions and statutes, petitioners urged that the trial judge ". . . would have been disqualified by the filing of the affidavits of prejudice, as a matter of law." (Supp. Pet., P. 10.)

had, more than four years earlier, deprived them of due process.

II. No Constitutional Issue was Timely Raised, Preserved or Ruled upon in the State Courts.

The petition for Certiorari herein does not state when in the trial court or in the appellate court, or how the supposed federal questions were raised, as required by Rule 23 (1)(f) of the Rules of this Court. Such omission, we suggest, was not inadvertent, but necessary because in fact they failed to raise any such questions in the trial court, in their lengthy (325 page) Appellant's Brief in the State Court of Appeals, or even in their Reply Brief in that Court.

For the convenience of this Court, we have reproduced in the Appendix (Infra, pp 16-A–26-A) several pages from the Table of Contents and the entire Index of Authorities from the Appellants' Abstract of Record and Brief, filed by Petitioners in the State Court of Appeals. *None of the 17 Assignments of Error, as there summarized, raise any issue of "due process," and no constitutional provisions, either state or federal, are cited or relied upon.*[6]

In connection with petitioners' failure to raise constitutional issues we call the Court's attention to pertinent portions of the Record.

In the State Court of Appeals, there was no error

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[6] Respondent has also filed a praescipe in the Supreme Court of Oregon and in the Court of Appeals of Oregon designating for inclusion in the record of this Court all of the printed briefs filed in those courts.

assigned, or issue raised, with respect to the integrity of the Trial Judge, of any nature whatsoever. That matter is now the subject of Petitioners' Question No. 1 (Pet. p. 2).

As to Question No. 2, the trial court's observation on their failure to call available witnesses (Pet. p. 3), that observation was the subject of Assignment of Error No. 8 in the Court below. The text of that Assignment with supporting argument is found on pages 207-211 of Petitioners' principal brief below. It was answered by Respondent on pages 90-93 of its brief and replied to by Petitioners in their Reply Br., pp. 53, 54. Aside from a passing reference to a "basic constitutional right" in the Reply Brief (P. 54), there is no suggestion of any federal question.

As to Question No. 3, relating to the scope of declaratory relief (Pet., p. 3), the same basic question was the subject matter of their Assignments in Error Nos. 10 and 11 below. These assignments with supporting argument are found at pp. 229-240 of Petitioners' brief below. Respondent answered the assignments at pp. 99-104 of its brief, and petitioners replied at pp. 63-74 of their reply brief. No "constitutional" or other federal right was relied upon.

Question No. 4 (Pet., p. 3) challenges the admission in evidence of two exhibits, identified as Ex. 113 and 488 (See Petition, pp. 30-33). The same basic objections as to authorship and supposed alterations as are raised here, were argued in the trial court and raised in Assignments

of Error 3 and 5 below. The pertinent Assignments and supporting arguments are at pp. 159-162 and 171-147. (Ex 113), and pp. 191-199 (Ex 488) of Petitioners' brief below. Again, Respondent answered (pp. 72-76; 86-88) and petitioners replied (pp. 49, 50; 52, 53). Aside from one reference to a "constitutional right of cross-examination" (App. Br. 197), a right no longer relied upon, there is again no suggestion of a federal constitutional issue.

The opinion of the Oregon Court of Appeals, *DeLong Corporation v. Oregon State Hwy Com.*, — Or App —, 495 P2d 1215, 94 Or Adv. Sh 983 (1972), contains no discussion or decision of any issue of due process, or of any other federal question.

This Court has held that only constitutional issues raised in the lower courts are before it for review. *Shelley v. Kraemer*, 334 U.S. 1, 8, 9 (1948).

Here, none of the four "Questions Presented" were suggested as sources of any due process issue either in the trial court or by Assignment of Error in the Oregon Court of Appeals.

In their Petition for Rehearing filed in the Oregon Court of Appeals, Petitioners first suggested that the trial court's observation on their failure to call available witnesses involved rights of ". . . due process of law under the constitutions of the State of Oregon and of the United States." (p. 5;). The argument in support of that contention cites no specific provision of either constitution or, indeed, any authority other than one Alaska state

court decision (pp. 25, 26). That argument, with vague constitutional overtones, was repeated in the original Petition for Review filed in the Oregon Supreme Court (pp. 48-50).

Otherwise, none of the four "due process" questions were raised as such until, as previously noted, petitioners belatedly raised the "judge" issue in their "Supplemental Petition for Reconsideration of Petition for Review."

It is fundamental that this court lacks jurisdiction on certiorari to review a federal question not raised, briefed or argued in the state courts. *Hill v. California,* 401 U.S. 797, 805 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969).

It is also the rule, at least in civil cases arising in State courts, that a federal question first raised on an application for rehearing in State appellate courts comes too late, and will not be reviewed here. *Hanson v. Denckla,* 357 U.S. 235, 243, 244, reh. den. 358 U.S. 858 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945).

If ever there was a case which warranted a denial of certiorari solely because the supposed federal questions were not timely raised and preserved, this is the case.

As outlined in the Statement of the Case (supra, pp 4–7), this case involves events occurring principally from 1962 to 1964. The action was commenced in 1965, involved extensive motions, amendments to pleadings and discovery, and finally came to trial in the spring of

1968. Reduced to essentials, the subject matter was conflicting claims of breach of contract.

The trial extended over a period of six months, and included over 9,000 pages of testimony and some 900 exhibits. Testimony was concluded in September, 1968, and the experienced Trial Judge considered the matter, presumably weighing the mass of evidence, until January 31, 1969, when he issued his well-reasoned opinion, including findings. The formal judgment was entered May 23, 1969, and an appeal followed. Lengthy briefs were filed in both sides, with numerous extensions of time, and oral arguments before the Court of Appeals were held on September 27, 1971. That Court affirmed the judgment in all respects on April 7, 1972.

Petitions and Supplemental Petitions for rehearing, review and reconsideration by the Oregon appellate Courts followed, and the last of these was denied December 12, 1972. *We repeated the foregoing to emphasize the magnitude of this case and the time and the "blood, sweat and tears" heretofore expended.*

After the protracted history of the case petitioners seemingly desire that this Court undertake to review the evidence (see Pet., pp. 29-33), or at least remand the cause of the Oregon Courts to start all over again. Such a result, we submit, should not occur without the clearest and most compelling of grounds.

As noted above, it was not until December 1, 1972, in their "Supplemental Petition" to the Supreme Court of Oregon, that petitioners raised the issue relating to

alleged grounds for disqualification of the trial judge. Even the petitioners seem to concede that their other points are not of independent concern to this court.[©]

They suggest that they did not discover the supposed relationship until sometime in 1972, when an investigator was employed. See the Affidavit of Mr. Cheasty, (Pet., p. 12a). The exact date of his employment is conspicuously absent, but the dates given strongly suggest that this was not until after the Oregon Court of Appeals' decision on April 7, 1972.

Why petitioners should suddenly decide to employ someone to "investigate the genuineness of certain documents and to do other factual research" (Pet., p. 12a) years after the trial and probably after the judgment was affirmed, is not explained. The lack of explanations is especially significant, since counsel ". . . *had serious doubts, beginning when there Exhibits . . . were introduced, as to the validity of their identification and as to their origin and identity.*" (Pet., p. 31a).

Against this background, the belated assertion of supposed violations of due process rights smacks of ". . . baseless, harassing or vexatious litigation in court after court by a disappointed litigant," of which petitioners "doth protest too much" their innocence (Pet., p. 4).[©]

[©] "The other errors of the trial court discussed herein emphasize the denial of due process of law suffered by Petitioners." (Pet., p. 34).

[©] The records of this Court will show thaat Petitioners also filed two Notices of Appeal to this Court, and unsuccessfully applied to Justice Douglas for a stay of execution, pending the proceedings on

If, as petitioners seem to imply, the decision of the trial Court could only result from bias on the part of the judge, why did they wait until four years after the trial to investigate and discover the supposed relationship? As shown by the documents reproduced in the petition, the transaction to which they object was concluded and a matter of public record no later than July 5, 1967 (Pet., p. 16a), nearly nine monthe *before* the trial started.

Respondent submits that there is not now and never was a significant federal question in this case, and that if there had been, the failure to raise and preserve it below is sufficient reason, under established principles, for this Court to refuse to review the matter.

III. The State Court Decision Rested on Substantial and Sufficient State Grounds.

It is also established doctrine that this Court will review a state Court's decision only when it appears that a federal question was presented to the highest state Court having jurisdiction, and that its decision on the federal question was necessary to its determination of the cause. Where the decision might have been on a substantial and sufficient state ground, this Court will not undertake to review it. *Durley v. Mayo,* 351 U.S. 277, reh. den. 352 U.S. 859 (1956); *Dixon v. Duffy,* 342 U.S. 33 (1951); *Radio Station WOW v. Johnson,* 326 U.S. 120, 129 (1945).

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appeal and/or certiorari. Similar application was made to and rejected by the state Circuit Court. As noted above, a separate suit to permanently enjoin Oregon's Attorney General from enforcing the judgment is pending in U. S. District Court for Oregon (See Pet., p. 5, n. 2). An appeal from the District Court's denial of a preliminary injunction is now pending in the 9th Circuit.

Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain the judgment, this Court will not take jurisdiction. *Lynch v. New York*, 293 U.S. 52, 54 (1934).

When the highest court of a state has failed to pass upon a federal question, it will be assumed that the omission was due to a want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. *Street v. New York*, 394 U.S. 576, 582 (1969).

There principles would also bar review by this Court, even if the presentation of a federal question below should be deemed sufficient.

It seems self-evident that petitioners "Questions Presented" Nos. 2, 3 and 4[7] were indeed decided on substantial and sufficient state grounds. Moreover, all of the matters involved in Questions Nos. 2, 3 and 4 were thoroughly briefed, argued and determined primarily or exclusively on the basis of traditionally state-law arguments.

Because of its late appearance, it might be argued that Question No. 1, relating to the supposed "relationship"

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[7] These are the questions involving, respectively, the "weaker and less satisfactory evidence" rule, the scope of declaratory relief, and the admissibility of certain exhibits. Petition, p. 3.

between the trial Judge and Respondent, was necessarily decided by the Oregon Supreme Court on a federal due process basis. That Court issued no written opinion in refusing to review the Court of Appeals' decision.

However, Respondent submits that the "judge" question could have been and presumably was based on adequate state grounds.

Petitioners related complaint in the U. S. District Court referred to above includes all of the material set out in the appendix to the petition here. That material strongly implies irregularity by the state Trial Judge and/or the Board of Control.

During oral argument on petitioners' motion for a temporary injunction, when pressed by the Federal Trial Judge, Petitioners' counsel retreated to admit that they claimed no irregularity in the land transaction or at the trial. Moreover, in the ruling from the bench denying the temporary injunction, *the court found that petitioners had admitted during arguments on the motion, that the State Trial Judge had not been biased or prejudiced.* Portions of the proceedings and the courts ruling are set out in the appendix, (Infra, pp. 27-A–35-A).©

Petitioners argument, then, is that under the Oregon

© Perhaps it is relevant here to direct the courts attention to *Lord Brothers v. State Highway Commission*, Marion County Case No. 62011, which involved a highway construction contract dispute. Judge George A. Jones presided over a 10 day trial beginning December 4, 1967. On January 17, 1968, Judgment was entered awarding the Plaintiff Contractor $38,207.88 in damages (with interest) against the State. This case was tried after the "land transaction" and before the DeLong case.

statutes (ORS 14.250; 14.250; Pet. pp. 50a, 51a), they were entitled to a change of judge upon the mere assertion of a belief of prejudice, by means of the statutory affidavit. If, as the federal court, found, petitioners admitted that the trial judge was not actually biased or prejudiced, they must mean that upuan a *ex post facto* showing of facts which they now say would have caused timely affidavits of prejudice to be filed, they are entitled to a new trial *even though they concede that there was no actual bias or prejudice against them*: Such a contention defies logic and is not supportable under State law.

Even under Oregon's liberal statutes, a litigant is not entitled to a friendly judge, but only to one who is impartial. *Archerd v. Burk*, 148 Or. 444, 451, 36 P2d 338 (1934).

Although a motion for change of judge may be allowed without establishing any actual prejudice on the part of the judge, if the affidavit is challenged it is still necessary to make a showing that the belief of prejudice is asserted in good faith. *State ex rel Lovell v. Weiss*, 250 Or 252, 430 P2d 357, 422 P2d 241.

The petitioners would have this Court hold that they are entitled to relief when they seek to disqualify the Judge for no reason at all, long *after* he decides the case against them.

Former Oregon statutes which provided for disqualification of a judge without cause were held unconstitutional, as being in violation of the principle of separation

of powers declared in Art. III, § 1 of the Oregon Constitution. *State ex rel Bushman v. Vanderberg*, 203 Or 326, 341, 280 P2d 344 (1955).[9] Obviously, the Oregon Supreme Court may very well have analyzed the "judge" issue in a similar way, and rejected it on purely state grounds.

There are other adequate state grounds to support the decision on this point. For one thing, the Oregon statutes provide in part that an affidavit of prejudice shall be filed:

> ". . . in contested cases before or within five days after such cause . . . is at issue upon a question of fact or within 10 days after the assignment, to preside over such cause . . .". (ORS 14.260; see Pet., p. 51a)

Or, in counties where there is a presiding judge, the motion and affidavit shall be filed at the time of the assignment of the case to a judge or:

> ". . . not later than the closing of the next judicial day; but no motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause . . .". (ORS 14.270; see Petition, p. 52a)

The "timely filing" provisions of these and predecessor statutes are construed to mean what they say, and a party who attempts to disqualify a judge too late will be barred from doing so. *Merimac Co. v. Portland Timber*, 259 Or 573, 575; 488 P2d 465 (1971); *State v. Little*, 249

[9] Even in states allowing each party a preemptory challenge to a judge, it is recognized that such "right" is a matter of grace to be distinguished from a disqualification for cause. *Hickey v. Superior Court*, 505 P2d 1086 (Ariz. App. 1973).

Or. 297, 303, 431 P2d 810 (1968), cert. den. 390 U.S. 955, (1968); *Rex Mtge. Loan Co. v. Stanfield,* 194 Or. 698, 244 P2d 173 (1952); *Mursener v. Redding,* 176 Or. 617, 628, 160 P2d 307 (1945); *Phy v. Allen,* 115 Or 168, 173, 236 P. 1056 (1925).

Certainly the Oregon Supreme Court was following Oregon law in rejecting Petitioners' attempt to disqualify the trial judge where the attempt was made after the case was tried, decided adversely to Petitioners, and affirmed on appeal.

Petitioners' attempt to avoid the requirement of timeliness of the basis of newly discovered facts will not bear scrutiny where they have offered no explanation whatever for the long delay in discovering the facts disclosed by public records.

Oregon law is that a party is chargeable with knowledge of matters of public record. See, e.g., *Kernin v. City of Coquille,* 143 Or 127, 136, 21 P2d 1078 (1933).[8] Thus, petitioners were chargeable with knowledge of the facts regarding the "relationship" at the time the case was assigned to Judge Jones for trial, and there can be no excuse for waiting until after an adverse decision, to try to disqualify the Judge on the basis of those facts.

Numerous other courts, both state and federal, have recognized the general principle that a party seeking to

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[8] The affidavit of Mr. Cheasty, Petitioners' investigator discloses that substantially all of the facts regarding the "relationship" were found in the Deed and Mortgage records of Polk County, Oregon, the minutes of the Board of Control of the State of Oregon, and assumed business name records. The latest recording date mentioned was July 5, 1967. (Pet., pp. 12a-17a).

disqualify a judge is obligated not only to act promptly upon discovery of the facts, but to exercise reasonable diligence in discovering the facts upon which they rely in charging bias as prejudice. See, for example, *Mayo v. Beber,* 177 Cal App. 2d 544, 2 Cal. Rptr. 405 (1960); *Aaberg v. District Court,* 136 Colo. 525, 319 P2d 491 (1958); *Silas v. Proctor Coal Co.,* 272 Ky. 477, 144 SW 2d 749 (1938); *Johns Hopkins University v. Hutton,* 316 F. Supp. 698 (D.C. Md. 1970); *United States v. Hoffa,* 245 F. Supp. 772 (D.C. Tenn. 1965).

In *United States v. Hoffa, supra,* defendants had been convicted of a crime, and the conviction affirmed on appeal. In moving for a new trial and for disqualification of the original trial judge, defendants relied on affidavits obtained some 18 months after the trial, and a few days after the affirmance on appeal. Although there were also other grounds for denying the motion, the following remark of the Court is apposite:

> "In this case there is a total lack of showing of any facts upon which diligence might be inferred. *The same diligence which produced the affidavit within a few days after affirmance of the defendants' convictions upon appeal could doubtless have produced it at any other time.*" 245 F. Supp. at 776. (Emphasis added)

The petitioners' argument about the supposed relationship were very probably rejected by the Oregon courts on the basis of State law. Their arguments on the other points raised here should, *a fortiori,* be regarded as rejected on state grounds below. No federal question having been necessarily passed on below, there is no

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federal question to be reviewed here, under the decisions of this Court discussed above.

IV. Aside from Jurisdictional Considerations, There Was No Disqualifying Relationship Between the Trial Judge and the Respondent.

We have heretofore discussed in detail the advertised public sale of the Colony Farm by the Board of Control at its appraised value. (Supra pp. 6–7) We reiterate that the sealed competitive bid by Judge Jones and his partners was the only bid received by the State. (Supra, p 7).

Petitioners claim that Judge Jones and his partners achieved a 50% increase in the average value of the purchased land (pet. p. 7). They then generously proclaim that they are not implying that the judge received a windfall (Pet. p. 7, n. 3).

An examination of the above claim illustrates the tenuous nature of petitioners reasoning and logic. Mr. Cheasty in his Affidavit calculates that Mr. Mason's July, 1965 appraisal reflects an average sales price of $421 per acre. He next reports, based on undisclosed reliable information, that Prudential Insurance Company had a June or July 1967 appraisal averaging $650 per acre on all of the land owned by Green Villa Farms.[9] The name of the appraiser is not disclosed. (Pet. 17a).

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[9] The Colony Farm contained approximately 754 acres of which 416.3 acres were non-tillable. (Pet. p. 16a) Mathematically the above referred to mortgage loan appraisal would include approximately 1850 acres at the claimed rate per acre. Nothing in petitioners affidavits disclose whether the other land owned by Green Villa Farms was similar to the Colony Farm.

Immediately one perceives that there is two years between the appraisals. Mathematically, the increase in land value under petitioners illusory formula would be 25%, not 50%. Moreover, *we submit that a subsequent appraisal by an undisclosed appraiser for a different purpose (mortgage loan) of a substantial different overall acreage is meaningless. There was no sale or other transaction to illustrate a value change.*

We have discussed the background and circumstances of the "land transaction" in detail as a preface to discussing petitioners legal authorities. Petitioners report "recent and controlling decision of this Court" to be: (Pet. p. 14) *Commonwealth Coatings Corp. v. Continental Gas. Co.*, 393 U.S. 145; *cf. Ward v. Monroeville*, decided November 14, 1972, 93 S. Ct. 80; *Tumey v. Ohio*, 273 U.S. 510.

The older cases are readily distinguishable. The *Tumey v. Ohio* case involves a situation where the mayor of the city served as the Trial Judge in a "mayor's court" and was compensated by the number of convictions obtained. The case held that a trial in such a court did not give a defendant convicted of boot-legging due process of law.

Ward v. Monroeville extended the *Tumey* doctrine to a situation where the Mayor served as a Trial Judge but was not paid on a per case basis. The defendant was tried and convicted for traffic violations. The opinion held that because the Mayor was responsible for the finances of the City,(which included substantial sums

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in traffic and other fines, due process required a different impartial judge.

We submit that the continuing direct and existing conflict of interest of a Mayor serving as a Trial Judge under those circumstances is completely different from the circumstances of this case.

The *Commonwealth Coatings Corp.*, case, *supra,* is also distinguishable on the facts. In that case the plaintiff subcontractor sued the prime contractor's surety. The matter was submitted to arbitration under the Federal Arbitration Act. Each party selected an arbitrator and they selected a third. The third arbitrator was a consulting engineer that had *irregular but repeated business* with the defendant, and had received fees totalling $12,000 over four or five years. The business relationship had been dormant for about a year, but apparently, had not been terminated. This business relationship with the defendant was not disclosed to the plointiff. This Court set aside the arbitration.

The facts of the *Commonwealth* case are distinguishable from this case in many respects including the following:

1. *Identity of Parties.* There the arbiter' relationship was directly with the defendant. Here the land transaction was not with the Respondent, but was with the State Board of Control, a different entity.

2. *Basic Nature of the Relationship*. The arbitrator had a continual, if intermittent relationship with the defendant, which apparently was dormant, but open. In this case there was a single arms-length transaction that had been closed and completed.

3. *Type of Contact.* The arbitrator as a consulting engineer would, of necessity, become involved with the operational affairs and personnel of the defendant. In this case the basic necessary contact was the submission to the Board of Control of a sealed bid to purchase the Colony Farm.

4. The element of advertising and competitive bidding, an important part of public contracting and the sale of publically owned surplus property, was not involved in the *Commonwealth* facts.

The two other cases cited by petitioners, *Carr v. Fife*, 156 U.S. 494; and *Texaco Inc. v. Chandler*, 354 F.2d 655, cert. denied, 383 U.S. 936, as implied by petitioners, are not too applicable or helpful in this case.

Interestingly in the *Carr v. Fife* case, this Court held that the fact the Trial Judge had represented some of defendants in unrelated matters prior to his appointment to the bench did not disqualify him from trying the case, and that the trial judge must be permitted to decide for himself whether or not to trye the case.

In that case, the Motion to Disqualify was made prior to trial. The opinion does not reveal the length of service of the Trial Judge prior to the subject litigation.

We have heretofore discussed the substantial and unexplained lack of diligence on the part of petitioners in investigating and discovering the relationship between the Trial Judge and the State Board of Control (Supra, pp. 14-16). We reiterate that petitioners' lack of diligence is an important factor for direct consideration by this Court in determining whether to grant certiorari. It is also obviously important in deciding whether or not the judgment is supportable on State grounds.

V. **Aside from Jurisdictional Considerations, There Was No Error in the Trial Court's Recognition That Petitioners Failed to Call Potential Witnesses.**

As has been noted, petitioners' Question No. 2 urges, in effect, that they were necessarily deprived of due process rights "guaranteed by the 14th Amendment" because the trial Court, in its written opinion, remarked upon their failure to call potential witnesses, including Colonel DeLong.

> ". . . in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party of produce, the evidence offered should be viewed with caution." (Pet. Question No. 2, p. 3; Trial Court's Opinion, pp. 3a, 5a).

Col. L. B. DeLong testified on deposition that he was the principal shareholder and president of DeLong Corporation, and was superintendent or project manager on this job from the time of George Bauer's death in May, 1963 (Ex. T-15, pp. 25, 56; See Resp. Br. p. 20) Petitioners in the State Trial Court did not present testimony by their second-level people, the formen and inspectors in charge of the DeLong crews and the work.

As noted above, the same comment was the subject of their Assignments of Error No. 8 in the Oregon Court of Appeals. In that Assignment, no "due process" or other federal question was asserted. (Supra, p. 11)

In responding thereto, Respondent pointed out among other things that Colonel DeLong's deposition was received in evidence and presumably considered, that the

Court's remark merely reflected a statutory jury instruction,[9] and that the Colonel could have testified on various pertinent matters not touched upon during his deposition (Resp. Brief, pp. 90-93).

Under Oregon law the same concept incorporated in the jury instructions is properly applicable when the Court, rather than a jury, is weighing the evidence. *Olds v. Van der Hellen,* 127 Or 276, 287, 263 P 907, 270 P. 497 (1928); *See also: Old Colony Insurance Company v. S. S. Southern Star,* 280 F. Supp. 189, 191 (D.C. Or., 1967), where the Court observed:

> "Such testimony would seem to be readily available to carrier and in the absence thereof or a reasonable explanation as to why it was not taken the Court can and does infer that it would have been unfavorable."

Respondent submits that any trier of fact, whether judge or jury, might with good reason find it remarkable that when a corporation is a litigant in a multi-million dollar action, its principal officer, with personal knowledge of the many materal facts, would not be called as a "live" witness.

There was no error in the trial Court's remark directed toward the weight of the evidence, under state law, and no federal question is presented.

VI. Aside From Judicial Considerations, There Was No Error in the Declaratory Relief Granted.

In support of their Question No. 3 (Pet., p. 3), petitioners seem to urge that they were improperly held

[9] ORS 17.250 (6) and (7), is reproduced in the Petition, (p. 53a-54a).

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liable to a non-party (Pet., pp. 2325). This is not the case at all.

Respondent's complaint insofar as pertinent to this point, alleged in substance that DeLong breached its contract by abandoning and failing to complete the work; that U. S. Steel Corporation, another contractor, has asserted a claim that as a result of the delay in completing the piers (under petitioner DeLong's contract), it has suffered delay damages in completing the superstructure, and that plaintiff (respondent here) was contractually liable for such delay damage. It was further alleged that under quoted provisions of DeLong's contract, DeLong was responsible for any loss suffered by other contractors on account of interference, untimely completion, or other cause. (Supp. Ab. 151-153).

The pertinent part of the prayer was for a declaration that *as between the parties,* plaintiff was not liable to U. S. Steel for any such delay damages rested upon defendants, who should indemnify plaintiff on account thereof (Supp. Ab. 154, 155).

There was no dispute as to U. S. Steel's assertion of such a claim, or as to the pertinent contract provisions relating to interference with the operations of other contractors. The trial Court found that DeLong breached its contract in failing to complete the piers, that the State's cancellaion of the contract was valid and proper, and that ". . . any delay from the date of cancellation caused to the United States Steel Corporation, the successful bidder for the superstructure, is the fault of the Defend-

ant and the Court so declares." (Ab. 22-25; Pet., p. 4a, 7a).

The formal Declaratory Judgment on this aspect of the case declared that:

> "6. As between plaintiff and defendants, any and all delay to United States Steel Corporation, the contractor for the steel superstructure erected upon the substructures which were the subject of the contract between plaintiff and defendant DeLong Corporation, which occurred from and after April 13, 1964, was caused by the fault of defendant DeLong Corporation;" (Ab. 73)

Thus, there was no adjudication that U. S. Steel suffered any delay, or sustained any damage, or that if so anyone was liable therefor. The issue of responsibility for delay in completing the piers was part and parcel of this action, and the trial Court's declaration regarding U.S. Steel merely reflected its adjudication of the dispute between the immediate parties.

Assuming, *arguendo,* that U.S. Steel will assert collateral estoppel against Petitioners (See Pet., p. 25, n. 18); it is evident that U.S. Steel would in any event still have to prove that it was in fact delayed, that the cause of the delay to it was the delay in completion of the piers, and that it was damaged as a result.

If collateral estoppel is available to U.S. Steel at all, (an issue obviously not before this Court), the only factual defense of which DeLong might be deprived would be that it was the State's fault completion of the piers was delayed after April 13, 1964. If U.S. Steel sought to recover for delays prior thereto, even the

"State's fault" defense would be available as to any such delays.

Since the question of responsibility for delays in the pier completion was in issue in this case, there was certainly no error in an express declaration that as between the immediate parties, DeLong was at fault with respect to delays after a designated date, and hence responsible for any loss which U.S. Steel might be able to prove was suffered as a result of those delays in the pier contract. No judgment for or against U.S. Steel was sought or granted.

Here, again, Petitioners raised the same point, without constitutional embellishments, as the subject of their Assignments of Error Nos. 10 and 11, in the state Court appeal (App. Br. 229-240) respondent fully answered (Resp. Br. 99-104), and the Oregon Court of Appeals found it unnecessary to specifically discuss this point. At the conclusion of an opinion running to 21 pages in the Pacific Reporter, in which the Court carefully considered the major points on the appeal, it was said:

> "We think the trial court made findings concerning every material fact necessary to its determination of the issues before it and to support its conclusions of law based thereon. The law requires no more. These findings are amply supported by the evidence.
>
> "Discussion of the remaining assignments of error, whether on the appeal or on the cross-appeal, would add only prolixity to this opinion. We conclude that they are without merit." 495 P.2d at 1236.

The same essential objection now raised here with respect to the declaration regarding U.S. Steel's claim

was one of the "prolixity-adding" contentions the Oregon Court found to be "without merit," and it deserves a similar fate at the hands of this Court.

VII. **Aside From Jurisdictional Considerations, There Was No Error and Certainly No Fraud in the Admission of the Challenged Exhibits.**

Question No. 4 attempts to raise a due process issue with respect to the introduction and supposed reliance upon "exhibits fraudulently offered and substantially altered." (Pet., p. 3)

In their Statement of the Case[8] petitioners refer to "extrinsic fraud" (Pet., p. 10), and undertake to re-argue the weight of the evidence, particularly with respect to Plaintiff's Exhibits 113 and 488 (Pet., pp. 11-13).

In their argument, petitioners suggest that the trial Court's conclusion on a key factual issue, the cause of defective concrete seals, could only have been based on these two exhibits (Pet., p. 30).

First respondence categorically denies that there was any fraud in connection with these or any other of its exhibits. The charge of fraud, like the "due process" issue, was not timely raised below and comes too late in a Petition for Certiorari to this Court.

Next, we repeat that the authorship and identity of numerous exhibits, including Exhibits 113 and 488, were challenged in the trial Court and on appeal. Pertinent

[8] "A concise statement of the case containing the *facts* material to the consideration of the questions presented" Rule 23, par. 1(c), Supreme Court Rules, emphasis added.

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references to the briefs below appear above (supra, pp 11-12) and will not be repeated here.

Next, there was a wealth of evidence to support the trial court's findings as to the causes of the defective concrete, and Petitioners' claim that the decision is supported only by the two challenged exhibits rests on nothing but Counsel's conjecture and argument. In view of the extent of the evidence bearing on this question, the claim is patently absurd.

We deem it inappropriate to re-argue the facts of the case here, but include a summary of the evidence on this point in the Appendix (Infra, pp. 8-A–15-A reproduced from pages 25-30 of Respondent's Brief below).

To the extent that the trial Court's opinion indicates what specific evidence was deemed persuasive on the issue of causes of the defective concrete seals, it appears that the Court's primary reliance was on expert testimony (Ab. 23; Pet., p. 5a), rather than on any particular exhibit or exhibits.

Even if the challenged exhibits were erroneously admitted, under Oregon law it is presumed that in non-jury case, receipt of inadmissible evidence was not prejudicial. *State v. Carnathan*, 2 Or. App. 67, 465 P2d 899 (1970); *Lehahan v. Leach*, 245 Or 496, 500, 422 P 2d 683 (1967); *Bakkensen v. John Hancock M. Life Ins. Co.*, 220 Or 484, 494, 353 P2d 558 (1960). Petitioners here have failed to and cannot overcome that presumption.

Petitioners apparently would have the Court regard the reports of their Questioned Documents Examiner

(Pet., pp. 33a-49a) as newly-discovered evidence, or the like. Mr. Rand, of their attorneys, candidly admits in his affidavit that "We had serious doubts, beginning when these Exhibits 113 and 488 were introduced, as to the validity of their identification and as to their origin and identity." (Pet., p. 31a). Why, in that event, he waited until 1972, four years after the trial, to employ an investigator "to investigate the genuineness of certain documents" (Affidavit of Mr. Cheasty, Pet., p. 12a) is not explained. If for no other reason, the "questioned document" evidence should be disregarded for lack of diligence in obtaining it.

Finally, the reports of the document examiner, if critically analyzed, seem to reveal nothing more sinister than that several persons made entries in the diary (Ex. 113) and the batching records (Ex. 488) at various times. From their inherent nature, this is not surprising, and was explained at the trial.

The document examiner apparently was unable to find evidence that any "editorial" or supplemental entries in the diary were entered otherwise than at the date indicated. He carps, however, that making an entry dated on "1/10/64" on the diary page for "12/15/63" was ". . . a violation of instructions printed in the inside of the diary cover. . . ." (Pet., p. 38a). If so, that is a matter going only to the weight of the evidence, does not tend to show fraud, and certainly presents no due process issue to this Court.

CONCLUSION

Respondent accepted the challenge of the Petition and discussed in detail the many issues set out therein. This is an important substantial case that has "spanned a decade" of controversy and litigation. It is our hope that the length of this brief will not obscure the simple issues and the patent lack of merit in Petitioners' cause.

Petitioners utterly failed to persuade the Oregon appellate Courts of any error in the trial of this hoary cause. They did not timely raise and preserve any federal question below, and have not shown any such question here. Most of the points raised here were urged below and rejected on adequate state grounds. No justification for the failure to discover the so-called "new evidence" on any point, until long after judgment and subsequent to affirmance on appeal, has been shown.

The petition should be summarily denied.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JOHN W. OSBURN
Solicitor General

WALTER L. BARRIE
Assistant Attorney General
and Counsel

LESLIE B. HAMPTON
Assistant Chief Trial Counsel
Counsel for Respondent

April 1973

APPENDIX

Exhibit A

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, VAL D. SLOPER, being first duly sworn on oath, depose and say:

That I am the Presiding Judge of the Circuit Court of Oregon for the County of Marion, Third Judicial District. I was elected to the Circuit Court Bench in November, 1954 and assumed the position in January, 1955. I was elected Presiding Judge in January, 1965 and have served as Presiding Judge since that date.

On the 30th day of August, 1965, the State of Oregon filed a suit for a Declaratory Judgment against the DeLong Corporation and the Travelers' Indemnity Company, Marion County Case No. 59-323. There were numerous motions, demurrers, and other preliminary legal matters prior to the trial that commenced on March 18, 1968. I presided over all preliminary legal matters in Marion County prior to trial.

During the first or second week of March, 1968, there was a pre-trial conference in my office attended by the attorneys for the respective parties. At that time, the attorneys estimated that the trial would last four to six weeks or longer, depending on whether or not a jury was empaneled. Because of my duties as Presiding Judge, I felt I should not personally be involved in a trial of that duration. Consequently, I assigned the case for trial to the Honorable George A. Jones. Judge Jones had no

prior duties in connection with or related to this lawsuit prior to the trial assignment which, according to the best of my recollection, was approximately one week prior to March 18, 1968.

No motions or affidavits were filed by the parties relative to the qualifications of any of the Judges in this district to preside over this case. Moreover, I was not advised formally or informally that any judge in the district, was unacceptable to any of the parties.

DATED this 27th day of March, 1973.

VAL D. SLOPER
Circuit Judge

SUBSCRIBED AND SWORN to before me this 27th day of March, 1973.

B. W. PEYTON
Notary Public for Oregon
My Commission Expires: Jan. 16, 1973

SEAL

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Exhibit B

STATE OF OREGON)
) ss. EXHIBIT "B"
County of Marion)

I, Carl A. Haugerud, being first duly sworn on oath depose and say:

That I am the Deputy Administrator of the Vocational Rehabilitation Division of the Department of Human Resources, State of Oregon. In 1960, I was employed by the State Board of Control and served in various capacities until my appointment as secretary on July 1, 1965. The secretary is the chief executive officer serving under the Board.

The Board of Control was made up of the Governor, the Secretary of State and the State Treasurer of the State of Oregon. Among its functions, was the administration of the State Penal Institutions, the State Mental Institutions, the Deaf and the Blind Schools, and the State T.B. Hospital.

In connection with those duties, the Board of Control, in the name of the State, held title to, and administered substantial real property holdings. To assist in the management of real property, the Board of Control Utilized an advisory board, called the "Land Use Committee" which was made up of appointed state officials and private citizens knowledgeable of real property and the management thereof.

One of the properties utilized in connection with the Oregon State Hospital was the "Colony Farm" which is located in Polk County, a few miles distance from Salem, the location of the State Capitol, and the State Hospital.

The farm was used for food production for the feeding of patients in the Oregon State Hospital in Salem.

Due to advances in the treatment of mentally ill patients and due to the construction of the Dammasch State Hospital, which is located about 25 miles north of Salem, the population of the Oregon State Hospital has been declining rapidly. In 1960, there were approximately 3,300 patients in that hospital. As of this date, there are approximately 600 patients there.

The Colony Farm became surplus to the needs of the State. Based on the recommendations of the staff and of the "Land Use Committee", the Board of Control decided to sell the Colony Farm. An appraisal was ordered from the Department of Veterans' Affairs, that maintains a staff of appraisers experienced in the appraisal of farm and residential properties. The appraisal in the amount of $175,000 was received on July 29, 1965.

In a meeting on August 17, 1965, the Board authorized sale of the property and established a minimum price of $175,000. The property was advertised for a cash sale in that amount.

On October 12, 1965, having received no bids, the Board directed the staff to study alternative methods of selling the Colony Farm. On November 3, 1965, the Board adopted a plan providing for a $175,000 minimum price with 25 percent down, the balance payable at 5½ percent interest over a 20-year period. The property was again advertised for sale.

On December 21, 1965, the Board, having received no bids, authorized the re-advertisement of the farm at $175,000 with $25,000 down, the balance being payable over a 20-year period at 5½ percent interest. On Feb-

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ruary 1, 1966, the Board of Control accepted the bid of "Green Villa Farms" at $175,000 under the advertised terms, who was the only bidder for the farm.

In advertising the Colony Farm for sale, the Board of Control placed ads with the Los Angeles Times, the San Francisco Examiner, the Portland Oregonian, the Statesman and the Capitol Press in Salem, the Itemizer-Observer in Dallas, Oregon (the County seat of Polk County) and with the Northwest Farm paper, an organization that publishes separate farm papers in Oregon, Washington, Idaho, Utah and Montana.

Green Villa Farms paid off their contract in full in July, 1967.

The Board of Control was abolished as of June 30, 1969 by act of the Oregon legislatures. The minutes, files and records of the Board are now in the Oregon State Archives. I reviewed and examined those records prior to making this affidavit.

In summary, the decision to sell the Colony Farm was made by the Board of Control with the advice of its staff and its "Land Use Committee". Through extensive advertising and sealed bids; the State, sold the property at its appraised value in the ordinary course of business using customary practices.

Dated this 27th day of March, 1973.

CARL A. HAUGERUD

Subscribed and sworn to before me this 27th day of March, 1973.

SEAL

JUANITA D. OLSON
Notary Public for Oregon
My Commission Expires: 2-29-76

Exhibit C

STATE OF OREGON)
) ss. AFFIDAVIT
County of Marion)

I, DON J. MASON, being first duly sworn on oath, depose and say:

That I am an independent fee appraiser and my office is located at 2586 Twelfth Place, S.E., Salem, Oregon. I am a member of the American Institute of Real Estate Appraisers and am an accredited rural appraiser. I am also a member of the Society of Real Estate Appraisers. I have been a real estate appraiser since 1959 and have had extensive experience in the appraisals of farms and ranches as well as the appraisal of other residential, commercial and industrial properties. Prior to 1959, I had 13 years experience in farm management, finance and other real estate oriented activities.

In January, 1959, I was employed by the State of Oregon, Department of Veterans' Affairs, as Farm Appraiser Supervisor. I appraised a substantial number of farms and ranches in that capacity. In addition to my own appraisal work, I supervised the other farm appraisers on the staff.

In the summer of 1965, I was given an assignment to appraise a property in Polk County, Oregon owned by the State Board of Control and known as the Colony farm. I was generally familiar with the area, where the property was located and made an extensive and detailed investigation of the area and of numerous comparable properties that had sold in the open market. I wrote an appraisal report dated July 28, 1965 setting out my opinion that the fair cash market value of the Colony

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farm was in the sum of $175,000. I had an alternative value of $177,500 if the farm was sold in two parcels.

I had no interest in the property whatsoever nor did I have knowledge of who, if anyone, was interested in purchasing the subject property.

I have been informed that the Colony farm was purchased by Green Villa Farms, a partnership composed of Asa Lewelling, George A. Jones and David Kennedy, Jr. At the time of the appraisal, I was not personally acquainted with any of those purchasers. I had heard of Mr. Asa Lewelling and knew he was a practicing attorney in Salem. I was introduced to Mr. Lewelling on one occasion some time in the early 1960's. I also recognized generally that the Kennedy family were farm operators in the Mid-Willamette Valley area at that time.

In March, 1968, I resigned from the Department of Veterans' Affairs and established my own appraisal practice. The first appraisal that I made for the Oregon Highway Division in any capacity was during 1969.

To summarize, my appraisal of the Colony farm was made routinely and objectively in the ordinary course of a routine assignment. My value conclusions were independently developed; and in my opinion, they represented the market value of the real property at the time the appraisal was made.

DATED this 26th day of March , 1973.

DON J. MASON, MAI

SUBSCRIBED AND SWORN to before me this 26th day of March , 1973.

SEAL

JUDY A. LeFORCE
Notary Public for Oregon
My Commission expires: 1-28-77

Defendants' Theory Unsound—Evidence

Although it is not deemed necessary to find or point out specific evidence justifying the trial Court's rejection of defendants' theory of what caused the bad concrete, it is nonetheless persuasive that several of plaintiff's experts had considered defendants' theory, found it unsound, and testified to the effect that it just could not have happened that way.

Defendant's theory at the trial was that vast quantities of riverbed material somehow worked its way under, over or through the steel cofferdams and into the seal area. (Tr. 5460-5462; 6447; 6783) In their brief, defendants characterized this theory in terms of "hydraulic" action (App. Br. 141, 142; 323).

Glen Paxson, a highly qualified former Deputy State Highway Engineer with over 40 years experience in bridge construction (Tr. 4695-4708; 4768-4770), testified that, in his opinion, based upon assumed facts, his own review of various documentary evidence, personal observation at the site and his general knowledge and experience (Tr. 8624), the underrun in the seal concrete was not caused by the intrusion of materials from outside the cofferdam (Tr. 8631).[8] Basically, this was because the only way for sand or other streambed material to get into the seal area was down the outside of the cofferdam piles, under the tips, and up the inside of the cofferdams. Neither the minimal differences in hydraulic "head," or

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[8] This testimony was on rebuttal, and not subject to defendants' motion to strike, denial of which is now assigned as error (App. Br. 155).

any differences in the weight of materials inside and outside the cofferdam, were sufficient to have forced sand underneath the sheet piles. "* * *The probability of such a thing happening is so remote that it can be considered as impossible." (Tr. 8631-8633)

Dr. Peter Klingeman, a professor of River Hydraulics of the Oregon State University School of Engineering (Tr. 8667, 8668) opined that substantial quantities of material did not intrude beneath the cofferdam sheeting (Tr. 8683). The only three way for this to occur would be by heaving, a blowout, or piping (Tr. 8684. Heaving could only occur if a large differential head existed and if there was a very minimum of tip embedment of the sheeting; neither condition existed. (Tr. 8684, 8685) A blowout would require that there be very little or no tip embedment as a result of scour (Tr. 8685); here, the earlier scouring had been arrested so that a scour mechanism could no longer occur, to undermine the tips of the sheeting, and consequently a blowout could no longer occur (Tr. 8686-8688). Piping would also have required a substantial difference in water elevation or "head", which did not exist (Tr. 8688, 8689). The theoretical impossibility of any of these phenomena was confirmed by the sounding maps, which failed to show that any large quantities of material disappeared from immediately outside the cells in December, when the seals were poured (Tr. 8689, 8690).

It may also be noted that the defendants' witness Kennedy, who devoted considerable effort to explaining

and demonstrating the "blowout" and "heaving" phenomena (Tr. 6428-6442; Ex. F-13), freely admitted that this related to conditions existing in September, when the scour occurred, and not in December when the seals were poured (Tr. 6438; 6475-6477; 6497).

Slow Rate of Pour as a Cause—Evidence

There was evidence that at a meeting on January 22, 1964 (Tr. 417), after it was discovered that the seals were defective, Colonel DeLong himself acknowledged that the rate of pour at Pier 169 had been about 25 or 29 yards per hour, and that on future tremie pours it should be about 80 yards per hour (Tr. 431, 431).

At the time the contract was awarded, the DeLong management planned a concrete operation capable of producing 70 to 100 yards per hour (Tr. 4206-4208; 4712, 4713). Hans Wendel, DeLong's Chief Engineer (Tr. 6633), assumed a maximum rate of pour of tremie concrete in the seals of 100 yards per hour, in his calculations in designing a cofferdam at Pier 169 (Tr. 6824-6833; Ex. 437, sheet 10). The DeLong people were disappointed in the performance of their concrete batching plant (Tr. 6844).

The actual rate of pour, as computed by one of the State engineers, averaged 25.1 yards per hour at the east or upstream seal, and 27.5 yards per hour at the west or downstream seal. (Ex. Q-1; Supporting data for these figures may be found in Exs. 112, 113 and 488).

In another case, Mr. Wendel testified on deposition that they expected production of 40 bags or 60 yards per

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hour (Tr. 6845-6847). In that case, DeLong asserted against the supplier of the "Roto-bags" used in batching concrete, a counter-claim for $180,000, based in part on the supplier's alleged promise that the bags could be filled at a rate of not less than 40 bags per hour (Ex. 414). That "Answer and Cross-Complaint" was filed January 3, 1964, shortly after the seals were poured and the underrun discovered.

On the monthly estimate for work through December 10, 1963, the State had paid DeLong approximately $90,000 for the seal concrete placed in the first or downstream seal at Pier 169 (Ex. 6, Est. No. 13; Tr. 2425, 2426). On the following estimate, for work through January 10, 1964, the State withheld payment for the upstream seal of some $90,000, and deducted the $90,000 paid the previous month for the downstream seal (Ex. 6, Est. No. 14; Tr. 2429-2431), as a result of which DeLong claimed it had been underpaid $180,000 (Ex. S-8).

The Court, it is submitted, could well have regarded DeLong's assertion of a $180,000 claim against its supplier of equipment for deficiencies in the rate of concrete production, just at the time DeLong was losing $180,000 for pouring bad concrete as persuasive evidence that DeLong recognized a relationship between the rate of pour and the failure of the seal concrete. At the very least, it establishes that DeLong knew that the rate of pour at the Pier 169 seals had been too slow.

Be that as it may, however, there was ample direct evidence that the slow rate of pour was one of the sig-

nificant factors in producing the defective material in the seals.

Glen Paxon, whose qualifications have already been mentioned (supra, p. 25), designated the slow rate of pour as one of the primary reasons for the poor concrete (Tr. 4763).

Walter Cathey, a retired construction man of vast experience in pouring underwater concrete (Tr. 8466-8473), testified that on a tremie pour of the size here involved, good construction practice required a minimum rate of pour of 100 yards per hour (Tr. 8478, 8479), and that the slow rate of pour here contributed to the concrete's failure to meet specifications (Tr. 8518, 8519).

Ben C. Gerwick, Chairman of the Board of a contracting firm, had over 60 years experience in bridge building, both as an engineer and as a contractor (Tr. 8393-8399). His firm had built wharves and bridges "practically all over the globe" (Tr. 8399, 8400). He had extensive experience with the placing of underwater concrete (Tr. 8402-8406) and had been publicly identified as the man who had been down personally in more cofferdams and caissons than any other man in the world (Tr. 8407, 8408). His opinion was that on a pour of the size here involved the rate of pour should be about 120 yards per hour (Tr. 8408-8410).

Arthur Elliott, the California bridge engineer whose qualifications were previously discussed (supra, p. 15), opined that the slow rate of pour was a contributing cause of the failure, and that a pour of this size should

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not be attempted without a capacity of at least 80 and preferably 100 yards per hour (Tr. 8799-8806).

Use of One Tremie Pipe and Water in Pipe as Causes of Defective Concrete—Evidence

At both seals in Pier 169, the concrete was poured through a single tremie pipe (Tr. 4741); Ex. 112, p. 23) which, after pouring at one location, would be moved to another location in the cofferdam (Tr. 4743; Ex. 489). Acceptable seals of comparable size were produced at Pier 170, where at least two and probably four tremie pipes were used (Tr. 8887, 8888; Ex. 491-493; *Cf.* Tr. 8899, 8901).

At times, as when the seal or prime was lost, water got into the pipe instead of concrete, and water would, on such occasions, gush between the flanges of the tremie tube (Tr. 2104, 2105; Ex. 113, p. 19).

Even Colonel DeLong agreed that concrete falling through water would "wash" and separate (Ex. T-15, p. 209). One of defendants' expert witnesses, William Mueser, agreed that if concrete fell from a tremie pipe through open water it would tend to separate (Tr. 5488, 5489).

According to Mr. Paxson, the basic cause of the bad concrete was the washing of the cement from the sand and gravel (Tr. 4763). Although the basic cause of the washing resulted from the slow rate of pour, leakage in the tremie pipe could also cause some washing (Tr. 4764).

Mr. Cathey believed that at least four tremie pipes

should be used on a pour of this magnitude (Tr. 8479, 8480). The joints on a jointed tremie pipe should be kept in a water tight condition (Tr. 8481). This witness was of the opinion that here the leaks in the tremie tube were the basic cause of the bad concrete, although other factors such as the slow rate of pour also contributed (Tr. 8518, 8519).

Ben Gerwick was of the belief that a least twelve and perhaps sixteen tremie pipes should have been used (Tr. 8411).

Arthur Elliott was of the opinion that it would be virtually impossible to make a satisfactory tremie pour with only one tremie pipe handled as was shown on Ex. 489 (Tr. 8803).

It is submitted that the evidence was more than sufficient to support the trial Court's findings as to what in fact caused the concrete to be bad. Certainly the evidence supported the Court's finding to the effect that it rejected, i.e., that defendants had failed to establish their supposed excuse for their breach of contract in refusing to remove and replace the unacceptable seals.

Defendants' Responsibilities, Termination of Contract—Evidence

The Court's remarks regarding it being the defendants' responsibility to pour good seals, to replace the defective material, etc., are of course derived from the basic nature of the contract and its specific terms and provisions. For example, the contractor agreed that the seals should be formed of Class A Concrete, with 10%

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additional cement (Tr. 379; Ex. 3, p. 56), and it was provided that Class A concrete would, within 28 days, develop a compressive strength of 3300 pounds per square inch. (Tr. 380; Ex. 3, p. 58; Ex. 4, p. 31, art. 2.4.5) Failure of the seal material to meet these standards has been discussed (supra, p. 3). It was contemplated that only the best general practice was to prevail, and that only material and workmanship of the first quality were to be used (Ex. 4, pp. 2, 3, art. 1.4.2). It was agreed that the performance of work under inspection would not relieve the contractor from his responsibility to comply with the specifications, nor from his responsibility if the work was not so performed (Ex. 4, p. 4, art. 1.5.2).

All concrete was requred to be placed so as to avoid segregation of the materials, and where placed through pipes, the pipes were to be kept full of concrete, insofar as practicable, and their lower ends were to be kept buried in the newly placed concrete (Ex. 4, pp. 33, 34, art. 2.4.9). Concrete seals under water were required to be placed continuously from start to finish, and the surface was to be kept as nearly horizontal as practicable; tremie tubes were required to be kept sealed and to be kept full to the bottom of the hopper (Ex. 4, p. 36, art 2.4.12).

The defendants' refusal to proceed with the necessary remedial work, and other work on the project was discussed above (supra, pp. 4, 5), and this was assuredly adequate ground for cancellation of the contract, as declared by the Court (See Ex. 4, p. 21, art. 1.8.7).

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I certify that the following material is from the transcript of proceedings in the related case, *Delong Corporation, et al. v. Lee Johnson,* Civil Case Number 73-20, U. S. District Court for Oregon. The hearing on Plaintiff's motion on January 30, 1973 for a preliminary injunction. George W. Mead, Esq. (now deceased) was of Counsel for Plaintiff DeLong Corporation. Presiding was the Honorable James M. Burns, District Judge. Dale A. Ray, 442 U. S. District Court, Portland, Oregon, was the reporter.

Leslie B. Hampton
Counsel for Respondent

* * * *

MR. MEAD: Yes, Your Honor. I think I will stick mostly to the factual situation in the case and confine myself to that and to the factual situation to a limited degree, because I don't think that in this proceeding that the Court can determine questions of fact other than what appears on the record as a matter of a prima facie case, that is stated by the affidavit.

I think the background of the time of the filing of these various different cases, the proceedings with respect to Judge Jones, the timing of this all has some relevance.

Now, in the first instance, let me state, Your Honor, that in our affidavit, and in our complaint, we don't say that Judge Jones did anything fraudulent, that Judge Jones did anything that was improper, except that we believe that he should disclose to us his relationship with the State of Oregon at the time this case was assigned to him, and this is what we say with regard to Judge Jones, and we say that we were entitled to that and we were entitled then, at that

time, to make a decision on whether we want them to proceed with Judge Jones and waive a jury and go on with him at that time or have some other judge.

* * * *

Now, we say that at that time, in view of what had transpired, well, we feel that Judge Jones had the responsibility or should have, at that time, advised us of his relationship with the State of Oregon in connection with the acquisition of this property. We don't say that he did anything improper in acquiring the property; we don't say that he did anything improper in the trial of the case, and we don't accuse him of any fraudulent or misconduct of any kind (emphasis added) but we believe that he should have disclosed that to us; that is all we are saying about Judge Jones.

* * * *

In 1966, Judge Jones and his associates purchased the property. The affidavits show that the value that was affixed at that time was some $421 an acre for the property. We don't say that that is a low valuation, that there was anything the matter with the transaction, but we do say that—then he mortgaged the property, ultimately, at a contract, was paying the State, and then in 1967 he arranged for a mortgage on that property, an adjacent property, on the basis of a much higher valuation, fifty percent higher.

Now, we don't say there is anything wrong with that either. Then he paid off the mortgage and acquired the property from the State in 1967; I believe it was in June or July or thereabouts.

Now, we don't say that there is anything improper with that transaction. We recognize that in addition to the large prison farm property that was required, there was some adjacent properties that were also involved in that transaction. We are not concerned

with the price; we are not concerned whether it was a profitable transaction to Judge Jones or an Unprofitable transaction. All we say is that we should have known about it at that time, known about his dealings of that type with the State of Oregon. We don't say that the State officials did anything improper with regard to it. It's merely a matter of disclosure, Your Honor, at that time, and we do say that in view of what had transpired there on our—

THE COURT: Well, excuse me. Wait a minute now, Mr. Mead.

MR. MEAD: Yes.

THE COURT: The allegation in the complaint which is filed is that Judge Jones purchased the property from the State at a very favorable price.

MR. MEAD: Yes, it was a favorable price.

THE COURT: Well, the allegations in Mr. Chesty's affidavit suggests that it was the same price as set forth in the appraisal that Mr. Mason made.

MR. MEAD: Yes.

THE COURT: Now, would one not properly assume that Mr. Mason was appraising the property for the State as the then owner and potential seller?

MR. MEAD: Mr. Mason, as I understand it, was a fee appraiser in that area, Your Honor, and did make an appraisel for the State. Also, he had made appraisals for the Highway Department, as I understand it, and we are not saying that there was anything improper about Mr.—that it was a favorable price, and I think it was a favorable price, because within just two years later, there was a loan made on the property, as I understand it, for $650 an acre.

THE COURT: Well now, wait a minute. Wait a minute, Mr. Mead. Let's stay with the allegation that it was acquired at a favorable price. Now, when you say "favorable price," do you mean if a person reads

that and reads through this allegation, you say the business relationship of Judge Jones involved the acquisition, during the pendency of this litigation, of certain valuable farm property, by the trial judge, together with two partners, from the plaintiff in the suit, from the State of Oregon, at a very favorable price.

MR. MEAD: Yes, sir.

THE COURT: Now, that sounds as if he got some real good deal from the State of Oregon; the fact of the business is, that as far as the operative allegations in the affidavit is, that he and his partners bought from the Board of Control at appraised value. Now, does that made it a favorable price?

MR. MEAD: I believe when we look at what happened two years later, it was a favorable price, and it was why I prefaced my remarks, if the Court please, and I jump right on that, that we don't say there was anything improper about it; the price was too high, it was too low, we don't say that at all. (emphasis added)

THE COURT: Well, it certainly sounds as if there is something funny going on when you say that Judge Jones bought a piece of property from the State of Oregon at a very favorable price. Now, secondly, we know that that property was purchased for a hundrey seventy-five thousand dollars, or $421 an acre.

MR. MEAD: That's right.

THE COURT: Right. Then you say two years later, when Prudential came in and paid off the State contract on that, as well as other parcels, that you end up with an overall average of $643 an acre, or whatever the $600 price is.

MR. MEAD: Approximately, that's right, and I

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mentioned that right off as Your Honor recalled, to the Court.

THE COURT: All right.

MR. MEAD: And I recognize—

THE COURT: Does that mean, therefore, that as of the time of the Prudential mortgage, that Prudential valued this parcel at $643 an acre?

MR. MEAD: Well, I think it means, Your Honor, that they must have valued it certainly at a great deal more than $421 an acre.

THE COURT: How do we know? Because we don't know the value of the other parcels.

MR. MEAD: That is absolutely true, Your Honor, and it was impossible for us to develop that, and I also made the observation, as the Court will recall, that this was a parcel combined with a larger parcel of property. We do know, I think, that most of this land was tillable land. I don't know what the other land could have been worth, $250 an acre, or it could have been worth a thousand dollars an acre, and I recognize that, and this is what I am mentioning, but I do say that if you acquire property at $421 an acre and two years later the price is $650 an acre, on an average, that that is a favorable transaction. I don't say that it is a favorable price. I mean by that that if I would buy the corner across the street over here, Your Honor, for a hundred thousand dollars, whether it would be appraised or not, and two years later sell it for a hundred fifty thousand dollars, that that hundred thousand dollar purchase would be a favorable price; that is all I am saying.

THE COURT: But there isn't any evidence here that that land was worth $643 an acre two years later.

MR. MEAD: Well, this was the average price, I believe, by the deed records that we were able to

determine, Your Honor, from the public record as to what the price was obtained.

THE COURT: That's like saying that if I sell Mr. Shenker a 1967 Ford for $500 and he gets a loan on it and then two years later he gets another loan on that Ford and four Cadillacs, that all of a sudden that Ford is worth a thousand dollars on the average, sounds like he's got a good deal on that Ford.

* * * *

I hereby certify that the following material is also from the transcript of proceedings in the District Court case, *DeLong v. Lee Johnson,* Case Number 73-20. The following is a portion of the oral opinion of the Honorable James M. Burns, District Judge, on February 21, 1973, denying Plaintiff's motion for a preliminary injunction. Roberta A. Armstrong, Court Reporter, Room 442, U. S. District Court, Portland, Oregon, reported the proceeding.

Leslie B. Hampton
Counsel for Petitioners

. . . This leaves the first two contentions which I'll discuss at some greater length.

First is the contention with respect to the judicial disqualification issue and second, is the contention based upon the receipt into evidence of the two allegedly forged or unconstitutionally got together Exhibits 113 and 488, I think I have the correct numbers there. Is there a substantial factual and legal likelihood that plaintiff will prevail on the judicial disqualification issue? I believe not for the following reasons:

In the first place, we're dealing with a somewhat peculiar situation in that under the Oregon statute any party has a right to disqualify two judges based upon a mere conclusory allegation that the judge is prejudiced against the party, and the essence of what

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plaintiffs say here in their pleadings is that the deprivation occurred because they were unaware of the land transaction which had occurred between the State of Oregon and Judge Jones prior to the trial of the case in Marion County Circuit Court, that had they been aware of that matter, they would have exercised their right under the disqualification statute to have filed an affidavit of prejudice and therefore they would not have been required to go to trial before Judge Jones.

Thus, plaintiffs say they have been deprived of due process by virtue of being deprived by an impartial tribunal to hear their case, and I must say I've had considerable difficulty in analyzing this claim because of the existence of the arbitration case which has been cited—I do not recall the name of it now, but we've all read it and discussed it at some length.

Nonetheless, the two leading cases are the *Tumey* case and the *Ward* case, and I do not regard those cases as calling for a conclusion that in the precise situation that we have here, the failure of Judge Jones to have disclosed the land transaction and thus the preventing as a result of the filing of an affidavit of prejudice, is the constitutional equivalent of the lack of partiality amongst the tribunal that was found by the Supreme Court in the *Ward* and the *Tumey* cases.

A party does not have, in my judgment, a constitutional right to an automatic change of judge statute. A party has a constitutional right to a judge who is fair and distinterested, but the parties here and particularly at the last time that we argued this matter on January 30, the parties specifically disclaimed any claim that Judge Jones was in fact actually prejudiced. That is not said once, but said a number of times by Mr. Mead, so what we have here is a claim that Judge Jones' failure to disclose the land trans-

action prevented the plaintiffs from exercising their rights to an automatic change of judge under an Oregon statute. (Emphasis added)

I do not regard that Oregon statute or its violation as being of constitutional magnitude and I find a significant and substantial difference between the thrust of the cases mentioned and this case, so without even getting into the question which may also be involved in this particular contention, the question of due diligence, without even getting into that and assuming that the plaintiffs here were duly diligent vis-a-vis the Judge Jones' land transaction disclosure matter, I do not believe that the deprivation which the plaintiffs claim they suffered, would amount to an unconstitutional deprivation and so therefore, I cannot say that there is a substantial likelihood that the plaintiffs would prevail on that contention.

With respect to the exhibits which were alleged to have been prepared and/or altered or otherwise handled so as to produce a judgment based upon forged or otherwise unconstitutionally prepared documents, I am satisfied of the following:

Namely, that I am not satisfied that there is a substantial or factual likelihood that the plaintiffs will be able to prevail on this score because I'm not satisfied that the plaintiffs will be able to show that factually that they exercised due diligence with respect to the investigation of this matter, and insofar as this is a Reid type case, it is my belief that one of the essential elements of a Reid cause of suit is the exercise of due diligence whether an appeal is pending or not, and I cannot say from what is here before me that I believe there is a substantial factual likelihood that plaintiffs will prevail on that issue when this case comes to trial.

I have some question in my mind, but I don't think it's necessary to reach a decision on it. I have some

question in my mind as to whether or not there is a substantial legal likelihood that the plaintiffs could prevail on this score, but I find it unnecessary to answer that because I have already made a finding that there is no showing of a substantial factual likelihood that the plaintiffs will prevail.

The reason that I say I have question in my mind about that is that in the context of that case and the length of it, and the manner in which the exhibits came in and he whole matrix of that case, I'm not so sure legally that even if it were shown that the documents were forged, that it would entitle the plaintiffs to relief here.

* * * *

I hereby certify that the affidavits reproduced in the Appendix (pp. 1-A–7-A) are true copies of the original and the whole thereof as filed in *DeLong v. Lee Johnson*, Civil Number 73-20.

I further certify that the above excerpts from the Federal District Court proceedings on January 30, 1973 (App. pp. 27-A–32-A) and on February 21, 1973, (App. pp. 32-A–35-A) are true copies of the original as reported and certified to the above named Court reporters.

Leslie B. Hampton
Counsel for Respondent